

E-Filed 05/29/07

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JAMES M. LEE, Derivatively on Behalf of
COHERENT, INC.,

Plaintiff,

v.

JOHN R. AMBROSEO, et al.,

Defendants,

AND ALL RELATED ACTIONS

Case Number C 07-0955 JF (HRL)

ORDER¹ (1) GRANTING MOTION
TO CONSOLIDATE ACTIONS (2)
DENYING MOTION TO APPOINT
LEAD PLAINTIFF AND (3)
APPOINTING CO-LEAD COUNSEL

[re: docket nos. 17, 20]

I. BACKGROUND

The following shareholder derivative actions on behalf of nominal defendant, Coherent, Inc. (“Coherent”) presently are pending before this Court:

¹ This disposition is not designated for publication and may not be cited.

Abbreviated Case Name	Case Number	Date Filed
<i>Lee v. Ambroseo, et al.</i>	C-07-00955-JF	2/15/2007
<i>Bartholomew v. Ambroseo, et al.</i>	C-07-01264-JF	3/2/2007
<i>Werner v. Couillaud, et al.</i>	C-07-01265-JF	3/2/2007

All three actions allege that members of Coherent's Board of Directors and other top executives violated federal and state laws through a scheme of backdating stock options and providing false statements to the Securities and Exchange Commission over a period of ten years from 1996 to 2006.

On March 15, 2007, the Court found that these derivative actions are related within the meaning of Civil Local Rule 3-12(a). On the same day, Plaintiff James Lee ("Lee") moved to consolidate the three actions, to appoint himself as lead plaintiff and his attorneys of record, Lerach Coughlin Stoia Geller Rudman & Robbins, LLP ("Lerach"), as lead counsel in the consolidated action. On April 3, 2007, after his case was reassigned to this Court, Lee re-noticed his motion ("Lee Motion"). Also on April 3, 2007, Plaintiff Michael Werner ("Werner") moved ("Werner Motion") to consolidate the three actions and to appoint as lead counsel his attorneys of record, Schiffrin Barroway Topaz & Kessler, LLP ("Schiffrin").

On April 27, 2007, Werner replied ("Werner Reply") to the Lee Motion by recommending that the Court designate Schiffrin and Lerach as co-lead counsel on the consolidated action. In light of this Court's prior decisions in other actions, Werner also recommended that the Court not appoint a lead plaintiff. The Werner Reply also stated that Lerach and Schiffrin have worked together as co-lead counsel on numerous other shareholder derivative actions. On May 4, 2007, Lee filed opposition to Werner's recommendation. Werner subsequently renewed his initial request that the Court name Schiffrin sole lead counsel.

Coherent has submitted a statement of non-opposition to the motions for consolidation, also stating that it has no opinion as to whom the Court should appoint as lead plaintiff and lead counsel. The plaintiff in the third related action, J. Davis Bartholomew, has not expressed an opinion regarding the consolidation or leadership of the litigation.

II. DISCUSSION

1. Consolidation of Shareholder Derivative Actions

Federal Rule of Civil Procedure 42(a) governs the consolidation of actions in federal court, allowing that actions involving a common question of law or fact may be consolidated and that the Court may make orders concerning the consolidated proceedings to avoid unnecessary costs or delay. Fed.R.Civ.P. 42(a). The three shareholder derivative actions clearly involve common questions of law and fact as they are brought against substantially the same defendants, allege the same violations of law and allege similar predicate facts. Moreover, the Court has received no opposition to the motions to consolidate. Accordingly, the motions will be granted.

2. Appointing Lead Plaintiff in a Consolidated Shareholder Derivative Action

Federal Rule of Civil Procedure 23.1 provides the requirements that must be met by a plaintiff of a shareholder derivative action. However, neither Rule 23.1 nor Federal Rule of Civil Procedure 42(a) requires that a court appoint a lead plaintiff in a consolidated shareholder derivative action. No Ninth Circuit precedent suggests that appointment of a lead plaintiff is required or even appropriate when that issue is contested in a shareholder derivative action.² Accordingly, the Court finds no reason to appoint a lead plaintiff in this action. The Court concludes that it need not formalize the relationship among the plaintiffs in the absence of a dispute between them or Ninth Circuit authority for such an appointment.

3. Appointing Lead Counsel in a Consolidated Shareholder Derivative Action

Federal Rule of Civil Procedure 42(a) grants district courts the authority to consolidate “actions involving a common question of law or fact” and to “make such orders concerning

² The Ninth Circuit has discussed appointment of lead plaintiffs in the context of securities fraud class actions. *See, e.g., In re Cavanaugh*, 306 F.3d 726 (9th Circuit 2002). Appointment of lead plaintiff in such cases is governed by the Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67 (1995). There is no similar act addressing shareholder derivative actions. Lee cites the United States Supreme Court’s decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). However, that decision does not address a contested position of lead plaintiff in a consolidated shareholder derivative action. Rather, *Cohen* discusses the general responsibilities of a plaintiff in a derivative action as a representative of a group of similarly situated shareholders.

proceedings therein as may tend to avoid unnecessary costs or delay.” The Second Circuit interpreted this rule in *MacAlister v. Guterma*, 263 F.2d 65 (2d Cir. 1958), holding that a district court may consolidate multiple derivative actions and appoint lead counsel for the consolidated plaintiffs. The Ninth Circuit followed *MacAlister* in *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977), noting that “[t]he benefits achieved by consolidation and the appointment of general counsel, i.e. elimination of duplication and repetition and in effect the creation of a coordinator through whom motions and discovery proceedings will be channeled, will most certainly redound to the benefit of all parties to the litigation.” *Vincent*, 557 F.2d at 774 (citing *Guterma*, 263 F.2d at 69).

Lerach and Schiffrin have demonstrated an ability to work efficiently together and have demonstrated independent expertise in complex derivative actions. Having considered the record as a whole, and after reviewing other derivative actions in which these two firms have performed and currently are performing as co-counsel, the Court appoints Lerach and Schiffrin as co-lead counsel for this consolidated action.

IV. ORDER

(1) Plaintiffs’ motions to consolidate the following actions is GRANTED: *Lee v. Ambroseo, et al.*, Case No. C 07-0955 JF; *Werner v. Ambroseo, et al.*, Case No. C 07-01265 JF; *Bartholomew v. Ambroseo, et al.*, Case No. C 07-01264 JF. All three actions will be litigated under the title *In re Coherent, Inc. Shareholder Derivative Litigation* with the lead case number, C 07-0955 JF.

(2) A consolidated complaint shall be filed on or before June 25, 2007. The parties shall appear for an initial Case Management Conference on July 13, 2007, at 10:30 a.m.

(3) Lee’s motion to appoint lead plaintiff is DENIED.

(4) The respective motions to appoint sole lead counsel are DENIED.

(5) Lerach Coughlin Stoia Geller Rudman & Robbins, LLP and Schiffrin Barroway Topaz & Kessler, LLP will serve as co-lead counsel for this litigation.

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JEREMY FOGEL
United States District Judge

This Order has been served upon the following persons:

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